No. 21097

In the
United States Court of Appeals
For the Ninth Circuit

UNITED PACIFIC INSURANCE CO.,
Appellant,

vs.

THE IDAHO FIRST NATIONAL BANK,
Appellee

THE IDAHO FIRST NATIONAL BANK,
Cross-Appellant,

vs.

UNITED PACIFIC INSURANCE CO.,
Cross-Appellee.

REPLY BRIEF OF CROSS-APPELLANT

On Appeal from the District Court of the United States for the District of Idaho, Southern Division

J. DENNIS FAUCHER
W. E. SULLIVAN
LANGROISE, CLARK & SULLIVAN
Attorneys for Cross-Appellant
300 Simplot Building
Boise, Idaho

No. 21097

In the
United States Court of Appeals
For the Ninth Circuit

UNITED PACIFIC INSURANCE CO.,
Appellant,

vs.

THE IDAHO FIRST NATIONAL BANK,
Appellee

THE IDAHO FIRST NATIONAL BANK,
Cross-Appellant,

vs.

UNITED PACIFIC INSURANCE CO.,
Cross-Appellee.

REPLY BRIEF OF CROSS-APPELLANT

On Appeal from the District Court of the United States for the District of Idaho, Southern Division

J. DENNIS FAUCHER
W. E. SULLIVAN
LANGROISE, CLARK & SULLIVAN
Attorneys for Cross-Appellant
300 Simplot Building
Boise, Idaho

SUBJECT INDEX

CITED CASES

STATUTES

No. 21097

In the

United States Court of Appeals For the Ninth Circuit

UNITED PACIFIC INSURANCE CO.,
Appellant,

vs.

THE IDAHO FIRST NATIONAL BANK,
Appellee

THE IDAHO FIRST NATIONAL BANK,
Cross-Appellant,

vs.

UNITED PACIFIC INSURANCE CO.,
Cross-Appellee.

REPLY BRIEF OF CROSS-APPELLANT

ARGUMENT

The contention of cross-appellant has been that the loss was covered by two insuring clauses—the one insuring against loss through false pretenses and the one insuring against loss through having given value upon a written instrument which was counterfeited. It is also cross-appellant's contention that the exclusions for forgery are not applicable.

In its brief the cross-appellee insurance company has contended that the forgery exclusions are applicable and that the clause insuring against loss through counterfeit instruments, insuring clause (E), does not cover this loss. It appears that these are the only remaining issues.

I. THE FORGERY EXCLUSIONS

Primary reliance is placed by the cross-appellee on two criminal statutes, and on cases which construe these statutes. The statutes, *Idaho Code* Secs. 18-3601 and 18-3606, are "catch-all" statutes. A reading of the sections discloses that an attempt was made to list as many various offenses as possible within two statutory crimes.

Not only do reason and logic dictate that such criminal statutes cannot form the basis for determining the definition of words used in an insurance policy, but case law provides a rule of law that the definition used in a criminal statute is not controlling. *Mitchell Grain & Supply Co. v. Maryland Casualty Co.*, 195 Pac. 978 108 Kan. 379 (1921); *Montana Auto Finance Corp. v. Federal Surety Co.*, 278 Pac. 116, 85 Mont. 149 (1929); *Terry v. Water Improvement Dist. No. 5*, 64 P2d 904, 179 Okla. 106 (1937); *Nugent v. Union Automobile Ins. Co.* 13 P2d 343, 140 Ore. 61 (1932); *Dexter-Horton Nat. Bank v. United States F. & G. Co.*, 270 Pac. 799, 149 Wash. 343 (1928).

All of the Idaho cases cited by cross-appellee are criminal cases and are subject to the same criticism.

Reliance upon *People's Bank & Trust Co. v. Fidelity & Casualty Co.*, 57 SE2d 809, 231 N.C. 510, 15 ALR2d 996 (1950) is also misplaced. That case stands only

for the proposition that it can be forgery for a person to sign his own name with the intent that it be taken for the signature of another existing person with the same name. 57 SE2d at 815.

There is a factor in the instant situation which can be illustrated by *People's Bank & Trust Co., v. Fidelity & Casualty Co., supra.* In that case insuring clauses (D) and (E) had both been deleted by rider. The court called attention to the fact that the exclusion was for loss effected "directly or indirectly" by forgery. In the instant case that general exclusion applies to the false pretense allegation but not to the contention that coverage is afforded by (E). The exclusion in (E) is for loss "through FORGERY . . ." While cross-appellant has no idea why different wording is used in these two exclusions, the contract is written and drafted by the insurance company, so there must be a reason. It appears logical that a loss effected "directly or indirectly" by forgery might not be one "through forgery." Thus, even though some resemblance to forgery might preclude recovery under insuring clause (B), recovery might still be allowed under (E). (The preceding is argumentative only and is not a waiver of the contention that recovery should be allowed under insuring clause (B)).

II. THE EXTENT OF COVERAGE OF (E).

Cross-appellee is now arguing that insuring clause (E) is meant to only cover losses where stocks and bonds are involved.

The fact that the title of the clause is "Securities" is of no importance because a caption should never of itself be taken to override the intention of the parties

to an insurance policy as shown by the provisions and clauses inserted under it. *National Indemnity Company v. Giampapa*, 399 P2d 81, 65 Wn2d 627 (1965); *Thompson v. State Auto. Mutual Ins. Co.*, 11 SE2d 849, 122 W.Va. 551 (1940). The clause itself covers ". . . securities, documents or other written instruments which prove to have been . . ." If any further evidence of intent is required it is supplied by the forgery exclusion provision which specifically refers to checks. If checks were not meant to come within the term "other written instruments," there would be no reason to refer specifically to them in connection with forgery.

The last argument contained in cross-appellee's brief is also refuted by the policy itself. Cross-appellee contends that counterfeiting only applies where currency and coins are involved, and therefore recovery cannot be allowed because the instrument in question was a cashier's check. The answer is that loss caused by counterfeit currency and coins is covered by another insuring clause—insuring clause (G). Therefore the counterfeiting covered by (E) is counterfeiting other than of coins and currency.

One last point can be made. In the initial brief on this cross-appeal the contention was made that insuring clause (E) distinguishes between "forged" and "counterfeited." Reliance was placed on *Fidelity Trust Co. v. American Surety Co. of New York*, 268 F2d 805 (3rd Cir. 1959). Through an error the diagram used by the court in that case appears incorrectly on page 11 of Brief of Cross-appellant. This diagram should appear as follows:

'Plaintiff is protected against loss from its having acted upon

"written instruments which prove to have been counterfeited

or forged as to the signature of any maker, drawer, issuer, endorser, assignor, lessee, transfer agent or registrar, acceptor, surety or guarantor or as to the signature of any person signing in any other capacity,

or raised

or otherwise altered

or lost

or stolen * * *" ' 268 F2d at 807.

The diagram speaks for itself in supporting cross-appellant's contention.

Respectfully submitted,

J. DENNIS FAUCHER
W. E. SULLIVAN
LANGROISE, CLARK & SULLIVAN

By .....
Attorneys for Cross-Appellant

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

J. Dennis Faucher, Attorney

ACKNOWLEDGMENT OF SERVICE

The undersigned, attorneys of record for cross-appellee herein, hereby acknowledges receipt of three copies of the foregoing brief this day of ....., 1966.

CLEMONS, SKILES & GREEN

By .....
Attorneys for Cross-Appellee